IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 86.

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that this Court grant rehearing of its order of October 14, 1954 denying the cross-petition for a writ of certiorari in the above entitled matter and that a writ of certiorari issue to review portions of the judgment of the United States Court of Appeals for the Tenth Circuit as prayed for in the cross-petition filed May 20, 1954.

Reasons for Granting Rehearing and Issuing the Writ.

1. Since the filing of the cross-petition, there has been an intervening circumstance which should form the basis for reconsideration by the Court of its denial of certiorari.

Both this Petitioner and the Federal Power Commission sought review of the judgment of the Court below in affirming in part and reversing in part a rate decrease determination of said Commission under Section 5(a) of the Natural Gas Act (52 Stat. 823, 15 U. S. C. §717d(a)). At the time the cross-petition for the writ was filed herein, the Court had not acted upon the petition filed on behalf of the Federal Power Commission seeking a writ of certiorari to review a portion of the judgment of the Court below in the same case which was adverse to said Commission. Subsequently, on June 7, 1954, this Court did grant the writ as applied for by the Commission. The cross-petition filed by this Petitioner, however, was not acted upon until October 14, 1954.*

This Court, therefore, already has before it an issue arising out of the same case below. The issue already before the Court—in No. 45—relates to the propriety of reversing a Federal Power Commission rate determination in part on a ground which the Commission claims the Court below could not consider for procedural reasons.

If this Court would vacate its denial of certiorari upon Petitioner's cross-petition and grant the writ as applied for, there would be before the Court one ground of a further procedural nature which goes to the heart of the whole administrative proceeding on the basis of unfair hearing and would render it unnecessary to reach the point brought here for review by the Commission in No. 45. The issue brought here by the Commission and by this Petitioner are opposite sides of the same coin.

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* The Commission's petition originally was No. 710 of October Term 1953 and this Petitioner's cross-petition was originally No. 777 of October Term 1953. These later were redesignated Nos. 45 and 86 of October Term 1954, respectively.

The two grounds asserted for granting certiorari on the cross-petition in No. 86 were:

(a) The question, brought to this Court for the first time, of whether the Commission, or any administrative agency with important rule-making functions, may dispense with the intermediate decision of a duly appointed Trial Examiner under Section 8(a) of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. §1007(a)) upon the mere assertion without substantial evidence to support such assertion that such omission was justified because "due and timely execution of its [the Commission's] functions imperatively and unavoidably so requires". The only justification cited by the Commission for so acting was that the Commission lacks reparation authority and Petitioner's rates might be excessive; and that the proceeding had been pending for an undue length of time through the fault of no party. One member of the Court below felt that the case should be reversed on this ground because the Commission lacks reparation authority in all cases. Presumably this could mean that the intermediate decision could always be avoided although the statutory plan was to require it except in very exceptional cases where substantial evidence would support findings of imperativeness and unavoidability. Such result would remove a procedural safeguard ordinarily meant to be available in administrative proceedings.

(b) Petitioner also brought to this Court a determination on the rate of return allowed to Petitioner in a rate case conducted by the Commission under Section 5(a) of the Natural Gas Act (*supra*) when such rate of return determination affirmed by the Court below was in conflict with a determination of the United States Court of Appeals for the Eighth Circuit in *State Corporation Commission of Kansas, Northern Natural Gas Company* v. *Federal Power*

Commission, 206 F. 2d 690 (8th Cir. 1953, cert. denied, 346 U. S. 922). The Commission in its brief in opposition to the cross-petition admitted that the decision of the Court below conflicts in principle at least with such determination in the Eighth Circuit (Commission Brief in Opposition, p. 18).

2. The questions brought to this Court by Petitioner are questions of large practical importance in the administration of the remedial legislation brought about through the Administrative Procedure Act and in the administrative process and rate-making process generally. The ability of a regulatory agency by administrative fiat to dispense with ordinary statutory safeguards should have the scrutiny and decision of this Court. Also, this Court should resolve a conflict presently existing between Circuits. Had this Court not granted certiorari to review a portion of the judgment below, as requested by the Commission, this rehearing probably would not have been requested, but the fact that the Court has in the intervening period granted such writ, it is deemed appropriate to request reconsideration of these important issues.

3. This Petitioner respectfully urges that here is an instance where a cross-petition for certiorari is peculiarly entitled to reconsideration. The ground for the Commission's successful petition in No. 45 was the only ground upon which the Court below reversed the Commission. If this Court determines that the Court below was in error, Petitioner has lost throughout without this Court passing upon the fairness of the hearing giving rise to the whole rate reduction order. If the Commission order issued without proper attention to the Administrative Procedure Act, the Commission should not be allowed to prevail in any part of the case or at any stage of review.

Conclusion.

For the reasons set forth above and in the cross-petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Tenth Circuit as requested in said cross-petition.

Respectfully submitted,

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October, 1954

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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Counsel for Petitioner